

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA,)	8:04CR17
)	
Plaintiff,)	
)	
vs.)	MEMORANDUM
)	AND ORDER
LUIS ALFREDO LUNA-MUNOZ,)	
)	
Defendant.)	

Defendant, a federal prisoner, has filed a notice of appeal from this court's judgment denying his 28 U.S.C. § 2255 motion (filing 39). Also before me are filing 41, the Memorandum from the Clerk of Court requesting a decision regarding whether Defendant may proceed in forma pauperis ("IFP") on appeal and filing 42, Defendant's motion for leave to appeal in forma pauperis. Defendant was financially unable to obtain an adequate defense in his criminal case. I will not exercise my discretion under Fed. R. App. P. 24(a) to deny Defendant the right to appeal the denial of his § 2255 motion in forma pauperis, and Defendant will be permitted to proceed on appeal in forma pauperis.¹

¹Fed. R. App. P. 24(a)(3) states in pertinent part that :

A party who was permitted to proceed in forma pauperis in the district-court action, or who was determined to be financially unable to obtain an adequate defense in a criminal case, may proceed on appeal in forma pauperis without further authorization, unless the district court--before or after the notice of appeal is filed--certifies that the appeal is not taken in good faith or finds that the party is not otherwise entitled to proceed in forma pauperis. In that event, the district court must state in writing its reasons for the certification or finding.

Before Defendant can appeal this court's decision denying his § 2255 motion, a certificate of appealability must issue. 28 U.S.C. § 2253(c)(1)(B). A certificate of appealability may issue under 28 U.S.C. § 2253 "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When a district court has rejected a constitutional claim on the merits in the course of denying a § 2255 petition, "[t]he petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong" in order to meet the standard contained in § 2253(c). Slack v. McDaniel, 120 S. Ct. 1595, 1604 (2000). In contrast, when a district court denies a § 2255 petition on procedural grounds without reaching the applicant's underlying constitutional claims on the merits, a certificate of appealability should issue under § 2253(c) when "the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." Slack, 120 S.Ct. at 1604.

The court must either issue a certificate of appealability indicating which issues satisfy the required showing, or must state the reasons why such a certificate should not issue. Fed. R. App. P. 22(b). For the reasons set forth in this court's memorandum and order denying the § 2255 motion (filing 38), Defendant has not made a substantial showing of the denial of a constitutional right within the meaning of 28 U.S.C. § 2253(c).

Accordingly,

IT IS ORDERED:

1. In response to the clerk's memorandum (filing 41) and to Defendant's motion for leave to appeal in forma pauperis (filing 42), Defendant may continue to proceed in forma pauperis on appeal;

2. A certificate of appealability is denied and shall not issue with respect to Defendant's notice of appeal (filing 40); and

3. The Clerk of the United States District Court for the District of Nebraska shall provide a copy of this order to the Eighth Circuit Court of Appeals.

July 26, 2005

BY THE COURT:

s/Richard G. Kopf
United States District Judge